

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

COLUMBIA MEMORIAL HOSPITAL

and

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

**Cases: 03-CA-120636
03-CA-122557
03-CA-124333
03-CA-124803
03-CA-124816**

**BRIEF OF THE EMPLOYER
COLUMBIA MEMORIAL HOSPITAL**

**LOMBARDI, WALSH, DAVENPORT
AND AMODEO, P.C.**

Paul E. Davenport, Esq.
Attorneys for Columbia Memorial Hospital
187 Wolf Road, Suite 211
Albany, New York 12205
Tel. No.: (518) 438-2000

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INTRODUCTION

Columbia Memorial Hospital is an acute, primary care medical facility located in Hudson, New York. Its primary purpose is to provide the highest quality medical care to the Columbia-Greene community.

In order to meet their objective, the Hospital requires its employees to be honest and comport oneself with the highest degree of integrity. These values are exceedingly important and is a core value the Hospital expects from every employee. The Hospital must meet this high standard of honesty and integrity, as its employees are the caretakers of sick, injured and terminally ill patients. Accordingly, all employees must maintain this high degree of professionalism so that no patient's care is compromised, and so mistakes or potential mistakes can be assessed and corrected. Any deviation from this standard is unacceptable, as it will directly impact patient care and well being.

The main issue in this proceeding is the honesty and integrity of a Hospital's Pharmacist, Cindy Northrup, during an investigation of her non-Union related misconduct in January, 2014. The proof reveals that Ms. Northrup was not honest, as she failed to disclose on three (3) separate occasions that on December 26, 2013, she allowed an unauthorized visitor, Rosa Lomuscio, to enter the Hospital through a limited access door, without requiring her to comply with the Hospital's after-hours sign-in procedures. This major security breach led to three (3) interviews with her; the last of which occurred after she was told that she did indeed let Ms. Lomuscio in that door on December 26, 2013 – yet she persisted, despite knowing that she let Ms. Lomuscio in, in not disclosing this information to the Hospital. She was subsequently disciplined for dishonesty but was given

a lesser sanction than other employees were given in similar discipline cases involving dishonesty during internal investigations.

Despite this proof that Ms. Northrup knew the honest answer to the question being asked of her, and yet persisted in refusing to provide truthful answers, and the unrefuted security concerns implicated by this misconduct, the ALJ found that the Hospital's discipline for her dishonesty violated Section 8(a)(3) of the Act.

The most concerning about this finding is that the primary basis for the ALJ's decision was that:

"... it is also understandable and reasonable for an employee not to incriminate him or herself. However, that is not being dishonest".
(emphasis added).

This is not only a dangerous precedent to set in a health care setting, as now employees will feel free not to be truthful when the Hospital is investigating any wrongdoing, including potentially life threatening misconduct, but also ignores long standing precedent allowing discipline for such acts where the employer reasonably believes that it occurred.

As such, this discipline for dishonesty, and her discipline for breaching security protocol in allowing Ms. Lomuscio in that limited access door without complying with the Hospital's security sign-in procedure warrants reversal of the ALJ decision.

FACTS

1. THE HOSPITAL'S RULES AND PROCEDURES ON NON-EMPLOYEE VISITORS.

Columbia Memorial Hospital is an acute, primary care facility located in Hudson, New York. It operates on a 24 hour a day basis and as such, and consistent with its duty to provide safety and security to its patients, visitors and employees, seeks to maintain a secure facility, particularly during the evening non-visitor hours, as there is limited security staff as well as a limited number of employees on duty available to observe and report security problems. (See, TT p. 603, testimony of Michael Hochman)¹

In 2008, as part of its safety and security obligations, the Hospital has implemented a policy where all doors to facilities, except the Emergency Department doors, are automatically locked at 8:00 p.m. However, for the convenience of employees, each are issued an electronic access card that permits entrance on a door on the Prospect Avenue side of the Hospital. This door is limited to provide access only to employees. The electronic access card is issued by the Security Department, which advises the employee that it is only to be used for their sole access and is not to be provided to anyone else or to be used to allow access to any other person. (TT p. 604-05, testimony of Michael Hochman). Additionally, the door itself has warnings on it that it is authorized access only which in conjunction with the instructions given by the Security Department provides the

¹ The letters "TT" refer to the Trial Transcript. The "p" refers to the page in that transcript.

employees with notice that they are not to allow anyone other than themselves in through the door. (See, Respondent Exhibits 6-7)

In 2010, an arbitration award was issued providing, for the first time, the Union's ability to access the Hospital facility after regular visiting hours ended at 8:00 p.m. (See, GC Exhibit 3). Under this Decision, the Union is allowed access to the facility throughout regular visiting hours as well as over-night. However, they are prohibited from accessing non-public and patient care areas. The Arbitrator specifically held, however, that in addition to the contractual notification provisions, the Hospital may enforce reasonable rules, including sign-in procedures, to assure the safety and security of the facility. Thus, the Union was required to adhere to all security procedures including the rules for non-employees' access after 8:00 p.m. After 8:00 p.m., all non-employee visitors are required to enter through the Emergency Department, sign in, and then be escorted by Security to the location of the Hospital where they are intending to go. The sign-in procedure is important, as it allows security to know where all persons are located in the facility in case of an emergency or evacuation. (See, TT p. 603, testimony of Michael Hochman; TT 462-63, testimony of Kelly Sweeney).

2. THE EVENTS OF DECEMBER 26, 2013 THAT LED TO INVESTIGATION OF UNAUTHORIZED ACCESS.

The Hospital's practice was when the Union notified them of their after-hours presence, an email was sent to Security and supervisory staff informing that they will be on-site. While Ms. Sweeney and Ms. Lomuscio had communicated about the Union being in the Facility after hours on December 26th, Ms. Sweeney felt that access to the front lobby

was prohibited, as she felt it was a non-public area due to the closing of the Facility at 8:00 p.m. She informed Ms. Lomuscio of this via a December 23, 2013 e-mail, which was never responded to. Thus, as Ms. Lomuscio did not confirm her location, and the location issue was never finalized, Ms. Sweeney did not send any email to Security or staff about the Union's presence. (See, TT pp. 445-48, testimony of Kelly Sweeney).

On December 26, 2013 the Hospital became aware of non-employees present in the Hospital front lobby after 8:00 p.m., who had not signed in at the Emergency Department. A nursing supervisor had reported the occurrence to Ms. Sweeney, who immediately commenced an investigation due to the presence of unauthorized personnel in the Hospital on that date, after regular visitor hours. She instructed the Director of Security, Michael Hochman, to commence that investigation. (See, GC 33; TT pp. 605-07, testimony of Michael Hochman). Mr. Hochman commenced his investigation by viewing the surveillance videos made of the lobby and the Prospect Avenue door, and the electronic time stamp that is recorded each time an employee's access card is utilized. He determined that at 8:01 p.m. on December 26th an access card issued to an employee by the name of Cindy Northrup was used to gain access. He also saw that two individuals had entered through the Prospect Avenue door at 8:01 p.m. and proceeded to the lobby. Mr. Hochman did not know who the individuals were, only that Ms. Northrup's access card was used. (See, TT pp. 607-13, testimony of Michael Hochman).

Mr. Hochman presented this information to Ms. Sweeney who, due to her long tenure at the Hospital, recognized both Ms. Northrup and Ms. Lomuscio. This confirmed that Ms. Northrup had improperly used her access card to allow a non-employee, Ms. Lomuscio, in the Facility without requiring her to sign in at the Emergency Department, as

required. (See, TT pp. 459-61, testimony of Kelly Sweeney). As part of that investigation, and consistent with the Hospital's practice to give the employee an opportunity to explain the events, Ms. Sweeney directed Shanda Steenburg, Director of Pharmacy to interview her employee, Cindy Northrup, about the evening of December 26th. (See, TT p. 465, testimony of Kelly Sweeney)

Ms. Steenburg interviewed Ms. Northrup first on January 2, 2014 and asked her the following questions and she provided the following answers:

"We were asked to investigate a Hospital access situation that occurred on 12/26/13. Per your time sheet, I see you worked from 7 - 3 pm".

Q. Which door did you come in?

A: Prospect door. This is the door I always use. I would not have come in the front door as I believe you cannot. Is there a swiper on the front door ... I believe it is locked after hours? I only remember coming in the front door when it is open. (Shanda responded that she did not know if the front door has a swiper or if it gets locked.)

Q. Were you alone?

A: Cindy took some time to think and then said: I can't recall

(see, GC - Exhibit 34)

After the January 2nd interview, Ms. Northrup contacted her Union representative, Timothy Rodgers, and discussed with him this interview. (See, TT pp. 332-33, testimony of Timothy Rodgers). Mr. Rodgers related his conversation with Ms. Northrup to Ms. Lomuscio, (see, TT p. 334, testimony of Timothy Rodgers). Additionally, pursuant to a letter dated January 3rd from Ms. Finnegan, which informed her that it was Ms. Lomuscio that was the unauthorized visitor on December 26th. (See, GC Exhibit 6)

Despite knowing that there was an on-going investigation concerning unauthorized access on December 26th, and that Ms. Northrup had been interviewed about that evening, Ms. Lomuscio testified that she never spoke with Ms. Northrup prior to her second interview with Ms. Steenburg on January 3, 2014. (See, TT pp. 149-52).

On January 3, 2014 that second interview was conducted and Ms. Steenburg asked more specific questions. Ms. Northrup was asked specifically if she let Ms. Lomuscio in the doors; and her answer was:

Q. Let me ask you another question, Did you let anyone in with you on the side door when you entered?

A. I don't recall

Q. Did you let Rosa from 1199 in that night of the 26th?

A. Do not recall.

(see, TT pp. 573-75, testimony of Shanda Steenburg and GC Exhibit 34).

Ms. Steenburg relayed Ms. Northrup's answer to Kelly Sweeney, the Director of Human Resources, who upon review of these responses felt that Ms. Northrup was not being honest. However, she determined just to proceed to discipline Ms. Northrup for allowing the unauthorized visitor in the Facility. She determined that because dishonesty was a serious charge, that rather than proceeding on that discipline immediately, she wanted to provide Ms. Northrup with an opportunity to explain and to change her answers as well as give the Union an opportunity to view the videos she had viewed as part of the original investigation. (See, TT pp. 467, 471-72, testimony of Kelly Sweeney)

Thus, after reviewing the investigation of Mr. Hochman, including the electronic time stamp and video, she issued a verbal warning to Ms. Northrup on January 8, 2014 for letting Ms. Lomuscio in through the limited access Prospect Avenue door without requiring her to sign in. (See, GC Exhibit 10).

3. FACTS ESTABLISHING THE UNION'S AND MS. NORTHRUP'S KNOWLEDGE OF THE TRUTH.

After imposing the January 8, 2014 discipline, the Union grieved her verbal warning, which gave the opportunity for Ms. Sweeney to personally interview Ms. Northrup and provide the Union with an opportunity to view the videos presented. That is because under the contractual grievance procedure, a third step hearing is required, where the employees are allowed to explain their position on the discipline. Furthermore, on January 8th an information request was filed with the Hospital asking for the videos. (see, TT p. 472, Testimony of Kelly Sweeney).

This third step meeting took place on January 28, 2014. Prior to that hearing, the Union was provided with the videos that were used as part of the basis of Ms. Northrup's January 8th discipline. Importantly, prior to the January 28th hearing, both Ms. Lomuscio and Ms. Northrup admitted that they had discussed the events of December 26th, including that Ms. Northrup had indeed let Ms. Lomuscio in the Prospect Avenue door after 8:00 p.m. on that night. Ms. Northrup testified based upon these discussions, she knew prior to the hearing she had let Ms. Lomuscio in through the Prospect Avenue door on December 26th. (See, TT pp. 235-36, 289-291, testimony of Cindy Northrup; p. 161,

testimony of Rosa Lomuscio)

4. IMPOSITION OF DISCIPLINE FOR DISHONESTY.

At the time of the January 28th third step meeting the Union had an opportunity to view the videos, and Ms. Northrup admitted prior to the hearing, she knew she let Ms. Lomuscio in the Prospect Avenue door on December 26, 2013 using her access card. Yet, despite knowing the truth, when asked specifically on January 28, 2014 whether she allowed Ms. Lomuscio in the Prospect Avenue door, she persisted in her answers that she did not recall letting Ms. Lomuscio in. (See, TT p. 481, testimony of Kelly Sweeney; pp. 581-82, testimony of Shanda Steenburg).

Therefore, as Ms. Northrup knew that she had let Ms. Lomuscio in that evening, and persisted in her dishonest answers on January 28th, Ms. Sweeney, after re-reviewing all the facts and circumstances decided to discipline Ms. Northrup for dishonesty. This discipline took place on February 11, 2014 and she was given a five day suspension. The Hospital had sanctioned other employees who engaged in dishonesty consistently before the Northrup discipline was imposed, including several instances of employees who were dishonest during the course of employer investigation. (See, Respondent Exhibits 8-11). However, Ms. Northrup was given a lesser punishment than these two (2) other employees, one Union and one non-Union, who were also found to have been dishonest during the course of an employer investigation; and both were terminated). (See, Respondent Exhibits 10 - 11). However, Ms. Northrup, based upon her long service to the Hospital and good record, was given a lesser penalty of a five day suspension. (See, TT

pp. 49-92, testimony of Kelly Sweeney)

ARGUMENT

POINT I

THE ALJ'S DETERMINATION THAT A DISCRIMINATORY ANIMUS MOTIVATED THE NORTHRUP DISCIPLINE IS REFUTED BY THE RECORD EVIDENCE

In cases involving allegations that an employer violated 8(a)(1) and (a) (3), the test enunciated in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983) is utilized. Initially, the General Counsel must establish by a preponderance of the credible evidence that anti-Union sentiment was a "motivating factor" for the discipline or discharge. This means that the General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. (*Wright Line*, supra, 251 NLRB at 1090).

To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the Union activity. (*Embassy Vacation Resorts*, 340 NLRB 846, 848 [2003]). Moreover, a finding of unlawful motivation on the part of the employer is undercut by subjecting the employee to a less onerous penalty, which contradicts an invidious intent ("*Dish Network Corp.*, 359 NLRB No.

108, slip op at 10 [2013]).

If the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. An employer meets its burden to show it would have disciplined the employee even absent the alleged protected activity by showing it had a reasonable belief that the employee engaged in conduct warranting the discipline imposed. (*GHR Energy Corp.* 294 NLRB 1011, 102-1013 [1989] *enfr.* 924 F2d. 1055 [5th Cir. 1991]; see, also, *Jordan Marsh Corp.*, 317 NLRB 460, 476 [1995] (Board affirmed the ALJ determination referencing this standard).

Here, in regards to the discipline given to Ms. Northrup on January 8, 2014 and February 11, 2014, it is submitted that the ALJ erred in finding that the General Counsel had met his burden under *Wright-Line*, and the proof that the Hospital would have disciplined Northrup even absent her alleged protected activity, as the proof revealed her misconduct occurred and Hospital had legitimate safety and security reasons for imposing the discipline.

1. **MS. NORTHRUP'S DELIBERATE DISHONESTY REFUTES ANY FINDING THAT SHE WAS ENGAGED IN PROTECTED ACTIVITY OR THAT THE HOSPITAL ACTED WITH DISCRIMINATORY INTENT.**

It is respectfully submitted that Ms. Northrup's deliberate deception and dishonesty lost the protection of the Act, which she was legitimately disciplined for, establishing that no 8(a)(1) or (3) violation occurred.

The Board has held that an employee may lose the protections of the Act, by engaging in conduct that is deliberately deceptive or maliciously false where there is no link between such conduct and the protected activity. Moreover, such deliberate falsity has been repeatedly held to be unprotected, even where part of the *res gestae* of otherwise protected conduct. (Encino Hospital Medical Center, 2014 NLRB LEXIS 140 [2014] citing Ogihara American Corp., 347 NLRB 110 [2006]) and cases therein.

Here, it is submitted, and further proof that the ALJ erroneously found that the General Counsel met its burden is that Ms. Northrup's discipline was based upon her deliberate deceptive and false statements during the course of the access card/lack of sign-in investigation, is not protected activity.

It is respectfully submitted, that Cindy Northrup's conduct, most egregiously during a January 28, 2014 hearing, when even after admitting she knew the truth, persisted in deliberately providing dishonest, or at the very least a deceptive answer to legitimate questions about her activities on December 26, 2013, is unprotected activity, rebutting any finding that the Hospital was motivated by discriminatory animus.

Thus, it was Ms. Northrup's own misconduct, including the unprotected act of being deliberately dishonest in regards to the Hospital's investigation that was the basis for her discipline, not any anti-Union animus. First, the record is devoid of any proof that the Hospital engaged in any oppressive or improper acts relevant to Ms. Northrup's Union status or actions. In fact, none of the Union witnesses testified that the Hospital's actions were the result of any of Ms. Northrup's Union activities.

Establishing that it was Ms. Northrup's unprotected conduct that led to her discipline

and not any anti-Union sentiment, was the proof that she intentionally failed to be honest in her answers during the investigation of the December 26th access to her incident. Her testimony that she could not recall whether she had let Ms. Lomuscio in the limited access Prospect Avenue door on December 26th is undercut by the fact that during her interview with Ms. Steenburg on January 2nd and 3rd, the Union had been notified by letter (see, GC - Exhibit 6) that an investigation of that access was being undertaken. Moreover, Ms. Lomuscio was informed on January 3rd, the day of Ms. Northrup's second interview that it was her who was the unauthorized visitor. (See, GC - Exhibit 8). It strains credibility that the Union either through Mr. Rodgers or Ms. Lomuscio did not discuss this with Ms. Northrup particularly between her January 2nd and 3rd interview when she knew that she was being interviewed as part of that investigation.

However, the most damaging proof that it was Ms. Northrup's misconduct that led to her discipline was her conduct at the January 28, 2014 third step grievance meeting. As the proof shows, prior to that meeting it is unrefuted she had been informed and knew that the unauthorized access that she was disciplined for was for her letting Ms. Lomuscio in the limited access Prospect Avenue door on December 26th. Ms. Northrup admitted that she knew that she did let Ms. Lomuscio in on December 26th before the January 28th grievance hearing (see, TT pp. 290-91, testimony of Cindy Northrup).

Yet, at that January 28, 2014 hearing, pursuant to the credible testimony of both Shanda Steenburg and Kelly Sweeney, she persisted her deliberate dishonesty, despite admitting that she knew she had let Ms. Lomuscio in that evening. In response to the direct question from Kelly Sweeney as to whether she let Ms. Lomuscio in through the Prospect

Avenue door on December 26, 2013, she replied, "*I do not recall*". This confirmed to Ms. Sweeney that Ms. Northrup was engaged in knowing and deliberate dishonesty which led to her discipline on February 11, 2014.

Thus, this credible proof shows that there wasn't any anti-Union sentiment that led to her discipline for dishonesty, but her own deliberate dishonest responses. Honesty in an employee investigation is of paramount importance to the Hospital, as they are a health care facility and must rely on the honesty of their employees to protect the safety of their patients. This proof shows that there was no anti-Union sentiment in regards to the discipline of Ms. Northrup. It was her own misconduct in making knowing dishonest statements during the course of the investigation.

Moreover, to find, as the ALJ did, that Ms. Northrup's deliberate dishonesty during the course of the Hospital's investigation, is protected, and "***understandable and reasonable for an employee not to self-incriminate oneself***" (see, pg. 10 ALJ Decision), particularly in a health care setting, is a dangerous and potential life threatening precedent. As Ms. Sweeney explained, importance of honesty by the Hospital's employees in regards to its investigations of misconduct could not be under stated. As she testified, it is vital to the operation of a health care facility that when investigations of misconduct are conducted, each employee is honest, so problems can be identified and rectified with no harm to the patients or staff. Mistakes, omissions and misconduct in the course of patient care will continue unabated if union staff members do not feel compelled to provide honest and forthright responses to Hospital investigations of these types of misconduct. The ALJ's decision sanctions an employee's lack of candor, and impedes the Hospital's ability to

identify and correct serious patient care mistakes – all to the detriment of its patients. An employee mistake that compromises a patients health, should not be shielded by some amorphous right not to self-incriminate – where honesty could remedy that mistake and insure it does not occur again.

2. THE TIMING OF THE NORTHRUP DISCIPLINE IS INSUFFICIENT TO ESTABLISH THAT THE HOSPITAL WAS MOTIVATED BY DISCRIMINATORY ANIMUS.

It is respectfully submitted that the facts elicited at hearing are insufficient to establish that the timing of either of Ms. Northrup's January 8, 2014 or her February 11, 2014 discipline establishes that the Hospital was motivated by discriminatory animus.

In his decision the ALJ appeared to rely exclusively upon the timing of Ms. Northrup's discipline to establish the third prong of the Wright-Line test, that the discipline was motivated by the Hospital's discriminatory intent. The ALJ did not point to any actions by the Hospital that constituted disparagement treatment of Ms. Northrup, shifting explanations for her discipline, a failure to investigate or that the Hospital's reason, safety and security concerns, defied logic, in determining whether any discriminatory animus existed. Rather, in conclusory fashion, the ALJ relied solely on the timing of the Northrup discipline, to show that the inference of discriminatory intent existed. (See, ALJ Decision at p. 10). In doing so, the ALJ cited State Plaza Hotel, 347 NLRB 755 [2006]) and Toll Manufacturing Company, 341 NLRB 832 [2004]) in support. However, not only do the facts belie that the timing support any inference of discriminatory intent, but both cases relied upon by the ALJ

are distinguishable from the case herein.

The facts giving rise to the Northrup discipline reveals the discipline was the result of the Hospital's regular disciplinary procedure, in no way raises or provides the inference for any discriminatory motivation. Here, the unrefuted proof revealed that the Hospital had legitimate safety and patient care concerns that led to the investigation and disciplining of Ms. Northrup for her unauthorized use of her access card allowing Ms. Lomuscio into the facility after-hours without requiring Ms. Lomuscio to sign in, and being dishonest in the course of the investigation of this misconduct. The proof revealed that one of the Hospital's main goal is the safety and protection of its patients and staff. Importantly, to allow an employee to be dishonest during the investigation may impact its ability to correct errors and omissions and put at risk its patients and staff. Additionally, the Hospital, as part of its obligation to provide the highest quality patient care needs to swiftly investigate and correct any issues that may implicate the safety of its patients and staff. That is why this investigation of discipline was imposed in a relatively short period of time after the wrong doing. The Hospital needs to correct errors, mistakes and omissions quickly so that it can protect its patients and staff. This is not an instance where timing gives rise to an inference of discrimination, but rather it is part of the normal Hospital process necessitated by the need to swiftly correct any issues that impact patient care.

The Board has cautioned against drawing an inference of animus based on time alone, where the employees' Union activities and the discharges did occur within a relatively brief period, but a legitimate explanation exists for the close proximity in time between the employee's blatant misconduct and the Respondent's decision to discipline them. Under

these circumstances, the Board has found the fact of timing is too weak a foundation upon which to base a finding of pretext. (See, Syracuse Scenery & State Lighting Co., 342 NLRB 672 (2004), see, also, Boardwalk Regency, 344 NLRB 984 [2005]).

Thus, as the ALJ relied solely upon the timing as he cited none of the other recognized pre-textual reasons that may support the inference of discriminatory animus, and the Hospital fully explained the relatively close proximity between the misconduct and discipline, the ALJ erred in finding that the timing was sufficient to establish the third Wright Line element.

Moreover, the cases relied upon by the ALJ are clearly distinguishable from the facts herein, and it is submitted lend no support to a finding of discrimination.

For example, in State Plaza Hotel, the Board held that the inference of discriminatory intent was supported not only on the timing of the discipline but also by the fact that the employee was disciplined twice in a short period of time for the very same offense; the second of which was a termination. Coupled with the lack of legitimate excuse for the duplicative discipline and no new facts being raised for the second discipline, the Board found that the inference of discriminatory motivation was established.

Here, Ms. Northrup's discipline resulted in two completely separate instances, and resulting from two completely separate investigations and the discipline imposed was not duplicative but based upon each independent finding of misconduct. Additionally, the discipline was imposed for the legitimate violations of safety and security concerns as well as patient care concerns. Her use of her access card to allow an unauthorized visitor into the Hospital without requiring a sign-in was a serious safety concern to the Hospital due to

the fact that unauthorized visitors may pose a safety threat to patients, staff and themselves in the case of an emergency. Additionally, her dishonesty during the course of the Hospital's investigation is a violation of the Hospital's paramount goal in providing safe patient care. To allow dishonesty in the course of an investigation may compromise Hospital's ability to properly correct mistakes which again may endanger patient health, and safety.

Thus, the facts herein are different to the facts in State Plaza Hotel and as such that case is distinguishable.

Similarly, in Toll Manufacturing Company, an employee was discharged suddenly and without warning during the course of a contentious Union organized campaign which this employee was a known leader. Here, there was no proof of a similar anti-Union atmosphere, as Ms. Northrup simply attending a regularly scheduled Union meeting at the Hospital while there was no Union organizing campaign or even collective bargaining over new, or successor agreement ongoing. Further, her discipline came after extensive investigation which she and the Union was aware of and based upon several legitimate Hospital safety and patient care concerns. Thus, the facts herein clearly distinguish it from the facts in Toll Manufacturing Company.

Thus, the finding that the timing of the Northrup discipline supports the inference of discriminatory animus is misplaced and the ALJ erred in relying on this basis to find that the General Counsel met this prong of the Wright-Line test.

3. **IMPOSITION OF LESSER DISCIPLINE THAN PAST INCIDENTS REFUTED FINDING OF DISCRIMINATION**

Moreover, and additional proof that the Hospital acted without any anti-Union animus is that it only imposed upon Ms. Northrup a five day suspension for her dishonesty, which was a lesser penalty of the Hospital's treatment of prior acts of dishonesty in internal investigations – each of which resulted in a termination.

Ms. Northrup based upon her long tenure and excellent performance record with the Hospital, was given a lesser penalty than these other employees who engaged in dishonesty. Rather than terminating her the Hospital only gave her a suspension, which was a lesser penalty than the other situations involving dishonesty, including dishonesty in internal investigations. (See, Respondent's Exhibits "8" through "11"). It is respectfully submitted that a finding of unlawful motivation on the part of the Hospital is undercut by their decision to give her a lesser penalty then previously imposed on dishonest employees. (See, Dish Network, 359 NLRB No. 108, Slip Opinion @ 10 2013).

In Dish Network, the Board agreed with the ALJ that the employer's decision to issue a lesser penalty than it could have, contradicted an invidious intent.

This reasoning in Dish Network, should be applied to Northrup's case, where the employer could have issued discipline consistent with its prior treatment of employees who engaged in dishonesty, (termination) but instead chose to take progressive action and only issue a five (5) day suspension. Again, this lesser penalty contradicts any inference that the Hospital had an improper intent in disciplining Ms. Northrup.

Therefore, based upon the forgoing it is respectfully submitted that the ALJ erred in finding that the General Counsel met its burden under Wright-Line to establish a prima facie case.

POINT II

THE PROOF ESTABLISHES THAT THE HOSPITAL WOULD HAVE TAKEN THE SAME ACTIONS IN THE ABSENCE OF NORTHROP'S UNION ACTIVITY.

Even if a prima facie case was shown, it is respectfully submitted that the Hospital established that it would have taken the same action absent the protected activity.

An employer to meet its burden to show that it would have disciplined an employee even in the absence of protected activity, does not need to prove that the employee committed the offense, only that it held a reasonable belief that the misconduct that occurred warranted discipline. (See, *McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 [2002]; *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 [2004]; *GHR Energy*, 294 NLRB 1011, 1012-1013 [1989]).

Here, the Hospital met this burden, as there is little dispute that Ms. Northrup engaged in the misconduct she was disciplined for. The proof clearly reveals she allowed Ms. Lomuscio in through that door without signing in; and certainly the Hospital had a reasonable belief that Ms. Northrup was dishonest during the course of their investigation of that incident. Moreover, the record established that the Hospital had legitimate patient safety and security concerns about the misconduct that led to Ms. Northrup's discipline.

The ALJ's basis for finding that the Hospital did not meet its burden would have disciplined Ms. Northrup absent her alleged protected activity is not supportable. First, it is submitted that the proof clearly established the misconduct, as the proof revealed that

Ms. Northrup did allow Ms. Lomuscio in through the limited access door without requiring her to sign-in; and Ms. Northrup's admission that she knew she had done so, and yet persisted in failing to disclose her acts – particularly at the January 28, 2014 hearing. Moreover, the safety and security concerns implicated by her conduct went unrefuted in the record. Both Kelly Sweeney and Shanda Steenburg, testified that honesty in a Hospital's investigation is a paramount concern of the Hospital due to the impact it could have on patient care and security. As both Ms. Sweeney, Ms. Steenburg and the Hospital's Director of Security, Michael Hochman, testified, the Hospital is charged with the care, safety and security of its patients and staff and thus requires honesty as omissions, mistakes that are made in these areas could have life threatening consequences.

Therefore, in order to swiftly correct mistakes and omissions and to ensure that these mistakes do not occur again, they require absolute honesty in their investigation of wrongdoing. This included the investigation of Ms. Northrup for allowing an unauthorized visitor into the Hospital. Moreover, as Mr. Hochman, as the Security Director testified, to allow an employee to avoid the security measures of after-hours visitors puts patients and staff at risk of potential assaults on patients and staff, the theft of prescription medicals and personal items; and it is even a risk to those unauthorized visitors such as Ms. Lomuscio, as Security does not know they are in the building they cannot contact them in the event of an emergency.

Thus, it is submitted that the Hospital met its burden to show it had a reasonable belief that Ms. Northrup engaged in misconduct, and that such misconduct could lead to safety and security concerns. Notably, the Board came to the same conclusion in GHR

Energy, 294 NLRB 1011 [1989] where it found that an employee's reasonable belief that the employer's misconduct endangered other employees, was sufficient to meet its burden to show it would have disciplined the employee, even in the absence of the protected activity.

Therefore, it is respectfully submitted that the ALJ erred in finding that the Hospital did not meet its burden to show it would have discipline Ms. Northrup even in the absence of the alleged protected activity.

1. **LACK OF SPECIFIC WRITTEN RULES DOES NOT
REFUTE THE HOSPITAL'S REASONABLE BELIEF
AS TO MS. NORTHRUP'S MISCONDUCT**

The ALJ, reasoned that the Hospital did not have a reasonable belief that Ms. Northrup committing misconduct warranting discipline by finding that no specific written rules exists prohibiting her acts. It is submitted that this is insufficient to show that the Hospital's discipline was improper.

It has long been a tenant of labor law that employee honesty is one of the most basic obligations an employee has to its employer. It is obvious that, at a bare minimum, companies must be able to trust their employees, and discipline them if they are dishonest. In fact,

[f]alse statements impair the employer's ability to make sound judgments that may be important to the employer's legal, ethical and economic well-being. So an employer is entitled to expect and to require truthfulness and accuracy from its employees in an internal investigation that is exploring possibly improper conduct in the business's own workplace.... Therefore, an employer,

in these situations, is entitled to rely on its good faith belief about falsity, concealment, and so forth."

(6 West Limited Corp. v. NLRB, 237 F. 3d 767, 778 (7th Cir. 2001) quoting EEOC v. Total System Services, Inc., 221 F. 3d 1171, 1176 [11th Cir. 2000]).

As discussed above, uncontroverted evidence in the record establishes that on three (3) occasions in January, 2014 Ms. Northrup told Company representatives that she did not remember bringing anyone into the Hospital – despite admitting that she knew she did so before her January 28th hearing. It is submitted that honesty is not something that requires a written rule or procedure, it is a basic obligation that all employees have, particularly in a health care setting. It strains credibility to claim that each and every employer in this country needs to have a written standard for dishonesty, when here a simple admission that she let Ms. Lomuscio in the building would have ended the inquiry and limiting the discipline to the verbal warning for the unauthorized access. It is submitted that there is no need for a written standard for dishonesty, particularly here where it is unrefuted that Ms. Northrup knew the truth and failed to disclose it.

Moreover, as set forth above, any employee deception or dishonesty in a health care setting puts patient care at risk.

Yet here the ALJ, in direct contravention of this long standing law, and in a harmful failure to recognize the far reaching implications Ms. Northrup's conduct may have on the Hospital's patients, found that Ms. Northrup's actions were "*understandable and reasonable*". The fact that he may have felt that an employee who is dishonest does not want to self-incriminate themselves is reasonable, does not refute the fact that the Hospital

had a reasonable basis for disciplining her. If this determination is upheld, employees engaged in wrong doing while performing patient care are now sanctioned to be "evasive" in responding to investigations of medical wrongdoing. This puts all Hospital patients at risk, as mistakes that are being made cannot be determined and remedied as the employees now are legally sanctioned not to be truthful. Thus, a Nurse who engages in life threatening misconduct may continue to treat patients unabated as she no longer feels the need to be truthful and forthright when that wrong doing is investigated. Thus, not only did the ALJ's determination is the ALJ in direct violation of the above referenced law, but its practical implications are far reaching and dangerous throughout the medical care community.

The same analysis is true for the after-hours access card/sign-in policy. But, here, the credible testimony of Mr. Hochman reveal each employee was told upon the issuance of the access card that they should not allow others to use it or to let others in without signing in. Add to this, the door itself had signs affixed to it indicating that only authorized persons were to use it, put all on notice as to the Hospitals policy. Moreover, like dishonesty, common sense would dictate that at night, no one should be let into the Hospital without notifying security - as that puts everyone, including that visitor at risk should there be an emergency.

Thus, this analysis of a lack of specific written rules does not address the serious safety concerns that underlay this discipline nor does it address the reasonableness of the Hospital's discipline. That is the standard on determining whether an employer would have disciplined an employee absent alleged protective activity. It appears the Judge below was

seeking to determine if “just cause” existed for the Northrup discipline – but that is not the standard. The Hospital met the relevant standard herein, by having a reasonable belief that the misconduct were events that warranted discipline.

**2. THE HOSPITAL’S PROOF INCLUDED PRIOR DISCIPLINE
FOR DISHONESTY IN INTERNAL INVESTIGATIONS**

Additionally, an ALJ’s finding (see, page 12) that the Respondent produced “No other individual or for (sic) being dishonest by failing to recall and refusing to identify someone”, is incorrect. First of all the ALJ is attempting to redefine the issue of similar treatment of similar circumstances. It is submitted that the submission of four prior instances of discipline for dishonesty, including two (2) that involved discipline that included termination from being dishonest during investigatory investigations establishes a lack of discriminatory intent. (See, Respondent’s Exhibits “8” through “11”)

Rather than relying on these closely analogous prior discipline’s that support the Hospital’s defense, the ALJ’s decision attempted to redefine the type of situations that would be analogous. He states that there were no prior disciplines for “failing to recall or refusing to identify someone. However, what he fails to address is the fact that this case went well beyond that, as Ms. Northrup admitted to knowing the correct and honest answer yet failed to disclose that. Thus, this was not a case to just failing to recall or identify it was a case where an employee had actual knowledge of the truth and failed to disclose it. Thus, she was dishonest in the prior disciplines contained in GC Exhibits “8” through “11” in support that this was a consistent application of the Hospital’s concern for honesty and

negates any discriminatory intent.

In regards to the January 8, 2014 discipline for her allowing Ms. Lomuscio in through the limited access door without requiring her to sign-in, the mere fact that there were no prior disciplines is also not dispositive on the issue of whether the Hospital had a reasonable belief that misconduct occurred.

As the Board has held, to show a prior instance of similar misconduct would preclude an employer from disciplining an unprecedented wrong, regardless of how egregious that wrong might be. (*PHL-Elco, Inc.*, 347 NLRB 1425 [2006]).

This is the case here, as Mr. Hochman, the Hospital's Director of Security testified, there was the first instance where an employee, after hours, had allowed a non-employee access through the Prospect Avenue door, without requiring compliance with the Hospital's sign-in procedures. Ms. Sweeney similarly testified.

Thus, it is submitted that the prior discipline for dishonesty support the legitimate discipline imposed upon Ms. Northrup for dishonesty; and the lack of prior discipline for unauthorized use of the access card and failing to comply with the security sign-in procedures does not refute the serious concern the Hospital had over these violations.

Finally, the record does not support the ALJ's finding that the record as a whole supports the fact that a Respondent had an intense interest as to whether the Union was intending to meet after 8:00 p.m. on December 26th in that Sweeney's investigation was to create a disciplinary situation rather than a legitimate investigation of her dishonesty.

3. **ALJ'S FINDING THAT THERE WAS AN ENVIRONMENT
OF ANIMUS IS REFUTED BY THE PROOF**

The ALJ made several findings that were used to show that the Hospital's actions were permeated with discriminatory animus. However, a close review of the testimony reveals that is not true.

The decision below found that the Hospital had an intense interest in the Union's presence on December 26, 2013. However, the unrefuted testimony revealed that Ms. Sweeney's interest in the December 26, 2013 Union meeting was as to the location in the Hospital, not that they would be present and existing on that night. As her testimony pointed out, she was simply concerned with enforcing the terms and conditions of Arbitrator Selchick's decision on access, specifically that portion that indicated that the Union was not permitted to hold meetings in patient care or non-public areas. There is nothing in her testimony that indicated that she was in any way attempting to discourage the Union's presence on the site, her only concern was that the location was consistent with the arbitration award.

Also, the ALJ's finding that she never intended to truly investigate this matter also belied by the record evidence. As noted above, the Hospital has an obligation which it takes seriously to investigate all acts of misconduct into swiftly discipline or remedy problems it determines it incurred. That is all Ms. Sweeney did. Consistent with her duty to do a thorough and complete investigation for an employee discipline, which includes giving Ms. Northrup an opportunity to explain herself after all the facts and circumstances

had been disclosed to the Union including the video tapes that she in part based her decision to discipline on, it was only then that she decided to discipline. Thus, the ALJ is in essence sanctioning the Hospital for performing its legal obligation to thoroughly investigate the matter and give the disciplined employee an opportunity to explain onself. (See, ie, Johnson Freightlines, 323 NLRB 1213, 1222 (1997), citing Publishers Printing Co., 317 NLRB 933, 938 (1995). However, here, as the Hospital did a careful and complete investigation, including provided Ms. Northrup with the opportunity to explain her conduct, supports the conclusion that the discipline was lawful. Caesars Atlantic City, 344 NLRB 984 (2005), rev. denied, 196 Fed. Appx. 59 [3rd Cir. 2006]).


Thus, the finding that there was an intense interest in the Union's activities on December 26th is refuted by this evidence, and Ms. Sweeney's actions in waiting to allow for Ms. Northrup to tell her side of the story is consistent with her legal obligations to perform a thorough and complete investigation before imposing discipline.

Thus, this basis for the ALJ's findings is contrary to the record.

CONCLUSION

For the foregoing reasons the portion of the ALJ's determination excepted to should be reversed.

Respectfully Submitted:



PAUL E. DAVENPORT, ESQ.

Counsel for the Respondent

Columbia Memorial Hospital

187 Wolf Road, Suite 211

Albany, New York 12205

Tel. No.: (518) 438-2000

